

**§ 36C-8B-19. Tax-related limitations.**

- (a) The following definitions apply in this section:
  - (1) Grantor trust. – A trust as to which a settlor of a first trust is considered the owner under sections 671 through 677 or section 679 of the Internal Revenue Code.
  - (2) Nongrantor trust. – A trust that is not a grantor trust.
  - (3) Qualified benefits property. – Property subject to the minimum distribution requirements of section 401(a)(9), and any applicable regulations, or to any similar requirements that refer to section 401(a)(9) of the Internal Revenue Code or the regulations.
- (b) An exercise of the decanting power shall be subject to the following limitations:
  - (1) If a first trust contains property that qualified, or would have qualified but for the provisions of this Chapter other than this section, for a marital deduction or a charitable deduction for purposes of the gift or estate tax under the Internal Revenue Code or a State gift, estate, or inheritance tax, the second trust must include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the marital deduction or charitable deduction, as the case may be, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or State law under which the transfer qualified.
  - (2) If the first trust contains property that qualified, or would have qualified but for the provisions of this Chapter other than this section, for the exclusion from gift tax described in section 2503(b) of the Internal Revenue Code, or section 2503(b) by the application of section 2503(c) of the Internal Revenue Code, the second trust may not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under section 2503(b) or section 2503(c) of the Internal Revenue Code.
  - (3) If the property of the first trust includes shares of stock in an S Corporation, as defined in section 1361 of the Internal Revenue Code, the following provisions apply:
    - a. If the first trust is, or but for the provisions of this Chapter other than this section would be, a permitted shareholder under any provision of section 1361 of the Internal Revenue Code, an authorized fiduciary may exercise the power with respect to part or all of the S Corporation stock only if any second trust receiving the stock is a permitted shareholder under section 1361(c)(2) of the Internal Revenue Code.
    - b. If the first trust is, or but for the provisions of this Chapter other than this section would be, a qualified Subchapter-S trust within the meaning of section 1361(d) of the Internal Revenue Code, the second trust must not include or omit a term that prevents the second trust from qualifying as a qualified Subchapter-S trust.
  - (4) If the first trust contains property that qualified, or would have qualified but for the provisions of this Chapter other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under section 2642(c) of the Internal Revenue Code, the second trust must not include or omit a term that, if included in or omitted from the first trust, would have

- prevented the transfer to the first trust from qualifying for a zero inclusion ratio under section 2642(c) of the Internal Revenue Code.
- (5) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second trust may not include or omit any term that, if included in or omitted from the first trust, would have increased the minimum distribution required with respect to the qualified benefits property under section 401(a)(9) of the Internal Revenue Code and any applicable regulations thereunder, or similar requirements that refer to section 401(a)(9) of the Internal Revenue Code or the regulations thereunder. If an attempted exercise of the decanting power violates this subdivision, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power and G.S. 36C-8B-22 applies to the separate share.
- (6) The following provisions apply to a grantor trust:
- a. If the first trust qualifies as a grantor trust because of the application of section 672(f)(2)(A) of the Internal Revenue Code, the second trust may not include or omit a term that, if included in or omitted from the first trust, would have prevented the first trust from qualifying under section 672(f)(2)(A) of the Internal Revenue Code.
  - b. Subject to subdivision (3) of this subsection relating to S corporation stock, (i) except as otherwise provided in sub-subdivision a. of this subdivision, the second trust may be a nongrantor trust even if the first trust is a grantor trust, and (ii) except as otherwise provided in sub-subdivision c. of this subdivision, the second trust may be a grantor trust even if the first trust is a nongrantor trust.
  - c. An authorized fiduciary may not exercise the decanting power if the settlor objects in a signed written instrument delivered to the fiduciary within the notice period and (i) the first trust and the second trust are both grantor trusts, in whole or in part, and the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or another person, or (ii) the first trust is a nongrantor trust and the second trust is a grantor trust, in whole or in part, with respect to the settlor, unless the settlor has the power at all times to cause the trust to cease to be a grantor trust, or the first trust contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second trust contains the same provision.
- (7) For the purposes of this subdivision, the term "tax benefit" means a federal or State tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to sub-subdivision b. of subdivision (6) of this subsection, a second trust may not include or omit a term that, if included in or omitted from the first trust, would have prevented qualification of the second trust for a tax benefit if both of the following apply:
- a. The first trust expressly indicates an attempt to qualify for the benefit, or the first trust clearly is designed to enable the first trust to qualify for the tax benefit.

- b. The transfer of property held by the first trust or the first trust qualified, or but for the provisions of this Chapter other than this section would have qualified, for the tax benefit. (2017-121, s. 1.)